Information and Privacy Commissioner,
Ontario, Canada

Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER PO-4000

Appeals PA17-378, PA17-386, PA17-411, and PA17-430

Ministry of the Environment, Conservation and Parks

October 28, 2019

Summary: The ministry received an access request for a specified report, pursuant to the *Freedom of Information and Protection of Privacy Act*. After notifying a number of affected parties, it decided to disclose the report in its entirety. Four of the affected parties appealed the decision to this office, relying on the mandatory third party information exemption at section 17(1) to withhold the information pertaining to them. During mediation, the requester raised the issues of the late filing of an appeal by appellants C and D, and the possible application of the public interest override at section 23. In this order, the adjudicator upholds the ministry's decision as the withheld information does not meet the harms part of the third party information test.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 17(1) and 50(2).

Orders and Investigation Reports Considered: Orders P-155, P-1402, PO-1916, PO-2497, PO-2520, PO-2629, PO-2774 and PO-3789.

BACKGROUND:

[1] The Ministry of the Environment, Conservation and Parks[1] (the ministry) received an access request, pursuant to the *Freedom of Information and Protection of Privacy*

[1] Formerly the Ministry of the Environment and Climate Change.

Act (the *Act*), for a report titled: *Assessment Report: Sulphur Contaminant Emissions from Ontario Petroleum Refineries, March 2014*.

[2] The ministry located the record and, prior to issuing its decision, notified a number of affected parties of this request, in accordance with section 28(1) of the *Act*, seeking their views about the disclosure of certain portions of the report. After hearing back from some of the affected parties, the ministry subsequently issued its decision to the affected parties and the requester to disclose the report in its entirety. The affected parties were given thirty days to appeal this decision prior to disclosure of the report to the requester.

[3] Four of the affected parties, now the appellants, appealed the ministry's decision to this office and four appeal files were opened. The appeals rely on the mandatory third party information exemption at section 17(1) of the *Act* to withhold the information pertaining to them.

[4] For ease of reference, I will refer to the appellants as follows:

- appellant A for appeal PA17-378
- appellant B for appeal PA17-386
- appellant C for appeal PA17-411
- appellant D for appeal PA17-430

[5] Appellant D is an association while appellants A, B, and C are members of that association.

[6] During mediation, the appellants and the requester consented to the mediator sharing their identities with each other.

[7] Subsequent to a teleconference call with the ministry, the appellants requested the opportunity to review additional portions of the report. The ministry shared some additional portions with each of the appellants.

[8] The appellants, after conferring with each other, consented to disclosure of portions of the report to the requester, which the appellants sent to the requester directly, copying the ministry and the mediator.

[9] Upon review of the partially disclosed report, the requester confirmed she continues to seek access to the remaining withheld portions. The requester advised the mediator that even if the information is found to be exempt under section 17(1) of the *Act*, there is a compelling public interest that warrants disclosure of the information under section 23 of the *Act*. As such, this issue was added to the appeals.

[10] Subsequent to receiving the Mediator's Report, the requester advised the

mediator that she wishes to add the late filing of the appeal by appellants C and D as an issue in these appeals. As such, this issue was added to the appeals.

[11] As further mediation was not possible, these appeals were moved to the adjudication stage, where an adjudicator conducts a written inquiry under the *Act*.

[12] During my inquiry, I invited the ministry, the requester, and the appellants to provide representations. All the parties provided representations.[2] I note that appellants A, B, and C mainly relied on the representations made by appellant D. Pursuant to section 7 of this office's *Code of Procedure* and *Practice Direction Number 7*, copies of the parties' representations were shared with one another.

[13] In this order, I uphold the ministry's decision as the withheld information does not meet the harms part of the third party information test.

RECORDS:

[14] The withheld information is contained in a report titled Assessment Report: Sulphur Contaminant Emissions from Ontario Petroleum Refineries, March 2014.

[15] The appellants oppose the disclosure of the withheld information.

ISSUES:

A. Should appellants C and D be allowed to appeal the ministry's decision after the 30 day appeal period?

B. Does the mandatory exemption at section 17(1) apply to the withheld information contained in the report?

DISCUSSION:

A: Should appellants C and D be allowed to appeal the ministry's decision after the 30 day appeal period?

[16] The requester asserts that she is prejudiced due to the late filing of the appeal by appellants C and D.

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[2] Appellant A also relied on its earlier submissions (contained in an email) to the ministry dated October 14, 2016 and Schedule "A" to its appeal form of August 24, 2017.
Appellant B also relied on its earlier submissions to the ministry dated October 14, 2016.

[17] Section 50(2) of the *Act* states:

> An appeal under subsection (1) shall be made within thirty days after the notice was given of the decision appealed from by filing with the Commissioner written notice of the appeal.

Summary of the parties' representations

[18] Appellants C and D both submit that their appeals were not filed late. Both appellants submit that they sought an extension from a named ministry staff member on August 2, 2017. They both submit that on the same day the named ministry staff member responded and advised that the ministry did not object to the extension of the 30-day filing period. Appellant C states that it filed its appeal on August 22, 2017 while Appellant D states it filed its appeal on August 31, 2017.

[19] In the alternative, both appellants submit that, if I find their appeal was filed late, the requester suffered no prejudice as a result of their late filing. They point out that four affected parties appealed the ministry's decision to disclose. They submit that even if they had not filed an appeal, the report would not have been disclosed due to the appeal of the other two affected parties. Both appellants submit that they would suffer prejudice if their appeal is deemed to have been filed late because they would not have an opportunity to make submissions with respect to the withheld information which they believe ought not to be disclosed.

[20] The requester submits that appellants C and D filed their appeal late as the *Act* does not allow an institution to extend the deadline for filing an appeal. As such, it submits that the extensions these appellants purported to negotiate with the ministry are invalid and irrelevant.

[21] The requester relies on Order P-155 for the principle that this office's jurisdiction to entertain late appeals must be decided on a case by case basis based on the circumstances in each particular case and that where a delay is significant or may prejudice the requester, this office may apply the appeal deadline strictly. It submits that in this case the principle favours a strict deadline as appellant C was 18 days late while appellant D was 27 days late. It submits that these delays are significant because they extend the appeal deadline by half again and nearly double, respectively. It points out that these delays are far longer than the delay in Order PO-1916, where this office accepted a third party appeal without deciding whether it was, in fact, late.

[22] The requester also submits that the appellants' role as affected parties is relevant as they seek to restrict access to information, which is contrary to the stated purpose of the *Act* to "provide a right of access to information under the control of institutions." It submits that since exemptions to that right must be limited and specific, this office should apply section 50(2) strictly to these appeals.

[23] In addition, the requester submits that the delay in filing these appeals has

delayed the entire appeal process and frustrated the requester's right to access information. It submits that, but for the late appeal, it would have been entitled to receive the report by August 4, 2017, except for the withheld information under appeal by appellants A and B. It points out that mediation did not begin until after the last appeal was filed, delaying the beginning of the process by nearly two months. The requester also submits that the late addition of two further appellants created significant delays in the mediation process as the mediator needed to collect information and coordinate the availability of four appellants instead of two.

[24] In response, Appellant D submits that the requester's argument that it would have received the report by August 4, 2017 but for the late appeals is incorrect and misleading. It points out that the appeals advanced by two of the four appellants were with respect to the entirety of the report. Appellant D submits, therefore, those appeals would have by necessity, delayed disclosure of the report and it would not have been provided to the requester by August 4, 2017 as it suggests. It also submits that at no point did any party, including the requester, take the position that it was unacceptable to wait for the final two appeals to be filed.

[25] In addition, appellant D submits that the delays attributable to the commencement of mediation cannot be attributed to the appellants. It points out that this office had the discretion to commence the mediation process sooner for the other two appellants but the mediator determined that since the four appeals related to the very same report, there was a benefit to coordinating the mediation process. Appellant D submits that there is no evidence to suggest that the requester was dissatisfied with proceeding in a coordinated manner or that it requested that the mediations and appeals be dealt with individually.

[26] Finally, appellant D submits that it is inappropriate to suggest that it was the coordination of the four appellants, rather than two appellants, that created an inability to schedule a mediation teleconference with the requester. She points out that there were extensive discussions underway between the mediator and the appellants after the filing of the appeals, including contact on an almost weekly basis.

[27] In response to the requester's argument, appellant C submits that the record demonstrates that it has actively participated in the ministry's process, now this office's appeal process. It submits that preventing it from participating in this appeal and sharing its perspective on the withheld information would be unjust in the circumstances.

[28] In its sur-reply representations, the requester submits that the only evidence before me of appellant C's reasons for requesting a deadline extension from the ministry is from the email of August 2, 2017 in which it states: "…Due to vacations and other seasonable priorities, we would like to request an extension to August 25 to request a review of your decision." It submits that it is highly relevant that appellant C attached lower priority to filing its appeal on time.

Analysis and findings

[29] Section 50(2) of the *Act* states that appeals must be filed within thirty days after the notice was given of the decision by the institution.

[30] It is clear that appellants C and D filed their appeals late. According to section 50(2), the deadline to file their appeal would be August 4, 2017 as the ministry's decision was dated July 4, 2017.[3]

[31] I acknowledge that this office, in a handful of older orders, has allowed parties to file their appeals late. In Order P-155, former Commissioner Sidney Linden stated the key to determining whether or not to allow a late appeal is to consider the relative prejudice to the parties should the adjudicator decide against them.

[32] However, it is unnecessary for me to consider whether these appeals should be accepted notwithstanding their lateness. As stated earlier, the substantive issue in these appeals is whether the withheld information contained in the report is exempt under section 17(1) of the *Act*. As section 17(1) is a mandatory exemption, I must consider it.

[33] As appellants C and D have submitted representations in these appeals, I will treat them as affected parties as the ministry's decision affects their interests. In this role, they have had the opportunity to argue that the withheld information is exempt under section 17(1). They also have had the right to be heard in these appeals. In these circumstances, treating them as affected parties as opposed to appellants does not prejudice them in any way. I also find that considering their representations is desirable to come to a fully informed decision and it does not prejudice the requester.

B: Does the mandatory exemption at section 17(1) apply to the records?

[34] The appellants[4] all argue that portions of the report should be withheld pursuant to section 17(1) of the *Act*.

[35] Section 17(1) states:

> A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,

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[3] As noted above, appellant C filed its appeal on August 22, 2017 while appellant D filed its appeal on August 31, 2017.

[4] Although I am treating appellants C and D as affected parties, I refer to them and appellants A and B collectively as the appellants, for simplicity. For the same reason, I will continue to refer to them as appellants C and D.

> (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
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> (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
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> (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or
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> (d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.

[36] Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[5] Although one of the central purposes of the *Act* is to shed light on the operations of government, section 17(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace.[6]

[37] For section 17(1) to apply, the institution and/or the third party must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and

2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and

3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b), (c) and/or (d) of section 17(1) will occur.

Part 1: type of information

[38] The types of information listed in section 17(1) have been discussed in prior orders. Relevant to this appeal are the following:

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[5] *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.), leave to appeal dismissed, Doc. M32858 (C.A.) (*Boeing Co.*).
[6] Orders PO-1805, PO-2018, PO-2184 and MO-1706.

> *Scientific information* is information belonging to an organized field of knowledge in the natural, biological or social sciences, or mathematics. In addition, for information to be characterized as scientific, it must relate to the observation and testing of a specific hypothesis or conclusion and be undertaken by an expert in the field.[7]
>
> *Technical information* is information belonging to an organized field of knowledge that would fall under the general categories of applied sciences or mechanical arts. Examples of these fields include architecture, engineering or electronics. While it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing.[8]

[39] Adopting the definitions set out above and from my review of the report, I am satisfied that it contains information that qualifies as technical and scientific information. The appellants and the ministry submit that the report contains scientific and technical information. The requester submits that some of the withheld information may be technical information but it cannot determine the extent to which the withheld information satisfies the first two parts of the test. As the ministry points out, the information at issue is information that was supplied in emission summary and dispersion modelling (ESDM) reports and which contributed to the ministry's analysis and creation of the report at issue. As such, it is clear that the report contains technical and scientific information.

[40] Accordingly, I find that the first part of the section 17(1) test is met. I will now consider the second part of the test.

Part 2: supplied in confidence

Supplied

[41] The requirement that the information was "supplied" to the institution reflects the purpose in section 17(1) of protecting the informational assets of third parties.[9]

[42] Information may qualify as "supplied" if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party.[10]

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[7] Order PO-2010.
[8] Order PO-2010.
[9] Order MO-1706.
[10] Orders PO-2020 and PO-2043.

In confidence

[43] In order to satisfy the "in confidence" component of part two, the parties resisting disclosure must establish that the supplier of the information had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis.[11]

[44] In determining whether an expectation of confidentiality is based on reasonable and objective grounds, all the circumstances of the case are considered, including whether the information was

- communicated to the institution on the basis that it was confidential and that it was to be kept confidential
- treated consistently by the third party in a manner that indicates a concern for confidentiality
- not otherwise disclosed or available from sources to which the public has access
- prepared for a purpose that would not entail disclosure.[12]

[45] Appellant B submits it supplied the information in confidence to the ministry. It submits that it supplied the information in its role as a participant in the study of options for air pollution control from the petroleum refining sub-sector and the discussions regarding development of a proposed technical standard for the petroleum refining sector in Ontario. Appellant B points out that, prior to providing the information contained on pages 9 and 36, it entered into non-disclosure and confidentiality agreements to protect the confidentiality of that information.

[46] Appellant C submits that it had a reasonable expectation that its information would be kept confidential. It submits that the data and information included in the report is confidential and would not have been submitted to the ministry without an expectation of confidentiality and privacy. Appellant C also submits that certain information that was incorporated into the report was subject to a non-disclosure and confidentiality agreement between it and the ministry. Appellant C points out that the agreement contemplated that the information provided pursuant to it would not have been provided to the ministry in the absence of a confidentiality agreement.

[47] Appellant D submits that the report contains data and information that is confidential and was submitted to the ministry with the expectation that it would not be

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[11] Order PO-2020.
[12] Orders PO-2043, PO-2371 and PO-2497, *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC).

released or disclosed to third parties.

[48] Although appellant A provided representations, its representations did not address whether the withheld information was supplied in confidence. As stated above, I note that it (along with appellants B and C) relies on appellant D's submissions.

[49] As stated above, the requester submits that it cannot determine the extent to which the withheld information in the report satisfies the first two parts of the test. However, it points out:

> For instance, on page 13 of the report, several items classified as "Ministry inputs and assumptions" are redacted. Such information is not necessarily "supplied to" [the ministry], nor is information based on these assumptions and [the ministry's] own mathematical calculations or models.

[50] The requester also questions whether appellant D has met the first two parts of the test. It states:

> Section 17(1) aims to "protect the confidential 'informational assets' of…organizations that provide information to government institutions." There is no evidence in the severed report or [appellant D's] submissions that the report reveals any confidential "informational assets" of [appellant D].

[51] The ministry submits that the information revealed by the report was supplied implicitly in confidence to it.

[52] In the circumstances, I am satisfied that the withheld information was "supplied" by the appellants to the ministry. It is clear that the appellants (excluding appellant D) supplied the information to the ministry in their role as participants in the study of options for air pollution control from the petroleum refining sub-sector and the discussions regarding development of a proposed technical standard for the petroleum refining sector in Ontario. I am also satisfied that the appellants had a reasonable expectation that the information they supplied would be kept confidential. I note that appellant B states that, prior to providing the information contained on pages 9 and 36, it entered into non-disclosure and confidentiality agreements to protect the confidentiality of that information. Similarly, appellant C submits that certain data or information that was incorporated into the report was subject to a non-disclosure and confidentiality agreement between it and the ministry. I also note that the appellants and ministry agree that there was a reasonable expectation of confidentiality. Accordingly, I find that the second part of the section 17(1) test is met.

Part 3: harms

[53] To satisfy the third part of the test, the appellants must provide evidence about

the potential for harm resulting from disclosure. It must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.[13]

[54] The failure of a party resisting disclosure to provide such evidence will not necessarily defeat the claim for exemption where harm can be inferred from the surrounding circumstances. However, parties should not assume that the harms under section 17(1) are self-evident or can be proven simply by repeating the description of harms in the *Act*.[14]

Summary of the parties' representations

[55] The appellants submit that disclosure of the information at issue could reasonably be expected to cause the harms noted in sections 17(1)(a), (b) and (c), as set out above.

Sections 17(1)(a) and (c)

[56] The appellants argue that disclosure could reasonably be expected to prejudice significantly their competitive position and interfere significantly with other negotiations, or result in undue loss to them or gain to their competitors.

[57] Appellant D submits that disclosure of the information could result in wrongful allegations against and reputational loss for its members. It explains that it and its affected members, either separately or as a group, engage in discussions regularly with government stakeholders on those matters addressed in the report. Appellant D submits that disclosure of the report may interfere with these discussions and misdirect the participation of public interest groups that may assume that the contents and conclusions in the report are accurate and engage in discussions based on inaccurate information and unsubstantiated conclusions.

[58] In addition, appellant D states that the report, which is dated 2014, relies on outdated data from 2002-2012, is still in draft form, and was never finalized. It submits that the report contains several conclusions which are not supported by the data. Appellant D also submits that third parties may form conclusions or rely on the views stated in the report, which views are clearly incorrect, have not been discussed or corroborated with the relevant stakeholders, and which would likely have changed substantially had the report ever been properly reviewed and finalized. It finally submits that those third parties may take actions or publicly rely on information that is incorrect

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[13] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.
[14] Order PO-2435.

and unsubstantiated, which would not be in the public interest.

[59] Appellant B submits that disclosure of the withheld information on page 11 could prejudice its competitive position *vis-a-vis* other petroleum refiners because it will give such other petroleum refiners information about its facility that is commercially sensitive, resulting in undue loss to it and undue gain to the other petroleum refiners. Appellant B also submits that disclosure of the inaccurate values and statements contained in the report could very likely prejudice its competitive position *vis-a-vis* other petroleum refiners in Ontario, Canada and around the world and/or interfere with its contractual or other negotiations with parties in Ontario, Canada and around the world.

[60] Appellant C submits that disclosure of the information could negatively affect the relationships between industry participants and other important local community stakeholders if disclosed. Appellant C also submits until the conclusions and inferences have been tested and the report has been finalized, the release of the assertions in the report is unlikely to contribute to a productive dialogue with respect to emissions abatement.

[61] The requester submits that none of the appellants provided further explanation as to how or why disclosure of the information about their facilities could cause them undue loss or prejudice their competitive position. It submits that these assertions lack sufficient detail to discharge these appellants' evidentiary burdens under section 17(1).

[62] The requester also points out, as an example, none of the appellants have explained why disclosure might remain harmful, despite the report's age. It submits:

> The risk of harm may lessen with the passage of time.[15] The information in the report is at least six years old; [appellant D] takes the position that the report is based on "outdated data from 2002-2012." Nevertheless, the appellants have not provided any evidence explaining how its disclosure might still pose a risk of competitive harm. This failure reinforces the speculative nature of the appellants' claims, which are too vague to meet the required burden of proof under sections 17(1)(a) and (c).

[63] In addition, the requester submits that disclosure could not reasonably be expected to result in the harms in sections 17(1)(a) or (c) simply because the appellants disagree with or have concerns about the record's accuracy or completeness. It relies on Orders PO-2629 and PO-3789 for the principle that inaccuracies, actual or perceived, could not reasonably be expected to result in one of the harms under section 17(1).

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[15] Order PO-2774.

[64] Finally, the requester submits that the arguments and record at issue in Order PO-2629 are virtually identical to those in the current appeals. In that appeal, the appellant did not provide any additional explanation about how or why its competitive position could be prejudiced or why any of the alleged harms could reasonably be expected to occur. As such, the requester submits that given the nearly identical circumstances of this appeal, there is no reason for me to depart from the decision in Order PO-2629.

[65] In response, appellant D submits that Order PO-2629 was not a virtually identical appeal. It submits that the report in Order PO-2629 was not a draft and outdated document which had never been finalized by the ministry, as is in the case in the current appeal.

[66] In response, the requester submits that while it is not clear whether the record at issue in Order PO-2629 was a draft version of a report, it is clear that the draft status of a report does not create a foundation for a reasonable expectation of harms under section 17(1). It points out that, in Order PO-1803, former Assistant Commissioner Mitchinson was not persuaded that a reasonable expectation of harm existed under section 17(1) for the record at issue – a more than 2-years old draft report.

[67] The ministry submits that it has insufficient evidence of prejudice to the appellants' competitive position or interference with their negotiations. The ministry submits that it is unable to determine in detail how the appellants' competitors could use the specific withheld information in the report in a manner that could reasonably be expected to prejudice significantly the appellants' competitive position and/or interfere significantly with an appellant's contractual or other negotiations. The ministry also submits that it is amenable to the appellants directly providing the requester a statement of their concerns on their perceived inaccuracy of the report.

[68] With respect to undue loss or gain, the ministry submits that in particular it does not have evidence that the withheld information, if disclosed, could reasonably be expected to result in undue loss for an appellant or undue gain for its competitors. The ministry states that it is unable to determine in detail how the appellants' competitors could use the specific withheld information in the report in a manner that could reasonably be expected to result in undue loss for an appellant or undue gain for its competitors.

Section 17(1)(b)

[69] The appellants submit that disclosure of the withheld information would discourage or cause companies to no longer supply such information and data to the ministry, when it is clearly in the public interest that companies continue to do so.

[70] Appellant B submits that breaching the non-disclosure and confidentiality agreements would very likely result in it refusing to voluntarily provide similar information to the ministry in the future, despite it being in the public interest that such

information be provided.

[71] The requester submits that disclosure of the full report could not discourage or cause companies to no longer supply information and data to the ministry. It submits that section 17(1)(b) does not apply where, as here, the ministry can compel production of the information in the record under a statute. The requester explains that the report contains information about sulphur dioxide (SO_2) emissions from petroleum refineries, including information from ESDM reports prepared under Ontario Regulation 419/05 and about SO_2 emissions during flaring or facility upset incident. It also submits that for any such information that the appellants (or others) supplied to the ministry, the ministry could have compelled its production under the *Environmental Protection Act* (the *EPA*) and Ontario Regulation 419/05. The requester further submits that appellants A, B, and C must submit an ESDM report to the ministry annually, and the ministry can compel these appellants to provide an incident-specific ESDM report or flaring emissions data on a case by case basis at any time.

[72] In addition, the requester submits that, as the ministry could compel production of the information contained in the report, it did not need to contract with appellants B and C. It also submits that the ministry cannot lawfully contract out of its duties under the *Act*. It relies on Order PO-2497, where Adjudicator Daphne Loukidelis states:

> Neither the access regime nor the oversight role of this office established by the *Act* can be qualified, neutralized or contracted out of by such an agreement.

[73] As such, although appellants B and C provided some information in the report under a non-disclosure and confidentiality agreement, breach of those agreements would not prevent them from disclosing similar information in the future as the ministry could compel production of the information.

[74] Finally, the requester submits that if appellant D supplied any information to the ministry, it is unlikely that disclosing the withheld information will prevent it from supplying information to the ministry in the future. It explains that appellant D exists to lobby the Ontario government on various transportation fuel issues, including environmental, health and safety policy and regulation. As such, the requester submits it is in appellant D's interests to continue to give the ministry access to information in order to advance its lobbying activities.

[75] The ministry submits it has insufficient evidence that disclosure of the information could result in similar information no longer being supplied to it. The ministry explains that the information at issue is information provided to it in ESDM reports. These reports are required to be prepared by Ontario Regulation 419/05 made under the *EPA*. The ministry points out that, as noted in PO-2629, although it prefers to work co-operatively with the industry, the *EPA* provides the authority to obtain this information. As such, the ministry submits it is not persuaded that this harm will come to pass.

Analysis and findings

[76] For the reasons that follow, I find that the appellants have failed to provide me with sufficient evidence to establish that disclosure of the withheld information could reasonably be expected to result in the harms contemplated under sections 17(1)(a), (b) and (c).

[77] With respect to sections 17(1)(a) and (c), I am not convinced that the harms under these sections could reasonably be expected to occur. Apart from reiterating the wording of these sections, the appellants have not explained or provided any further detail or evidence of the nature of the anticipated harms. Nor have they made any attempts to link disclosure of the withheld information to the harms under these sections. I find that their representations fall short of the sort of detailed evidence that is required to establish these harms. Instead, their representations amount to speculation of the possible harms under these sections.

[78] As well, as past orders of this office has stated, the risk of competitive harm with disclosure of a record may lessen with the passage of time.[16] As I understand it, the report relies on outdated data from 2002-2012.[17] As such, the data is between 7 to 17 years old. I note the report is dated March 2014, more than 5 years ago. In such circumstances, I am not convinced that disclosure of the withheld information could reasonably pose a risk of competitive harm to the appellants.

[79] Although the appellants argue that the report contain inaccuracies or unsubstantiated conclusions, I am not persuaded that inaccuracies, actual or perceived, could reasonably be expected to result in one of the harms under sections 17(1)(a) and/or (c).

[80] In Order PO-1803, former Assistant Commissioner Mitchinson commented on the impact of inaccurate or incomplete information in regards to the harms under these sections:

> In addition, the appellant and affected persons have indicated that the draft report does not provide 'a comprehensive picture of the situation as the companion document to the Report is not yet complete' and that 'disclosure of the Report to a third party, then, will misinform and mislead the third party'. None of these parties has identified any specific errors, inadequacies or deficiencies contained in the draft, nor are any clear on its face. If the appellant and affected persons are concerned that errors would go unnoticed, they are certainly able to convey this information to

[16] See Orders PO-2774, MO-1781 and MO-2249-I.
[17] Appellant D's representations dated July 27, 2018.

> the requester in order to avoid misinterpretation. Also, the draft report is dated June 8, 1998, more than two years ago.

[81] In my view, these comments are similarly relevant to the circumstances of the current appeal. In this case, due to the inquiry process, the requester has received a copy of appellants A's and B's correspondence dated October 14, 2016 to the ministry in which they stated what they perceived to be inaccurate information or unsubstantiated conclusions by the author(s) of the report. As well, the appellants are welcome to convey inaccuracies, errors or unsubstantiated conclusions to the requester in order to avoid any misinterpretation of the information in the record.

[82] With respect to section 17(1)(b), I am not persuaded that disclosure of the withheld information could reasonably be expected to result in similar information no longer being supplied to the ministry. I acknowledge that the ministry entered into non-disclosure and confidentiality agreements with appellants B and C. However, it is a well-established principle that one may not contract out of the provisions of the *Act*.[18] Moreover, under section 18 of the *EPA* and sections 10, 24.1 and 15 of Ontario Regulation 419/05, the ministry could compel production of the information contained in the report. In particular, appellants A, B, and C must submit an ESDM report to the ministry annually, and the ministry can compel these appellants to provide an incident-specific ESDM report or flaring emissions data on a case by case basis at any time. As such, I find that the appellants have failed to establish that disclosure of the withheld information could reasonably be expected to result in similar information no longer being supplied, where it is in the public interest that similar information continue to be supplied.

[83] In sum, I find that the withheld information does not qualify for exemption under sections 17(1)(a), (b) or (c), and should therefore be disclosed.

[84] Due to my findings above, it is unnecessary for me to consider whether the public interest at section 23 applies.

ORDER:

1. I uphold the ministry's decision to disclose the report in its entirety.
2. I order the ministry to disclose the report to the requester by **December 3, 2019** but not before **November 28, 2019**.

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[18] See Orders PO-2497 and PO-2520.

3. In order to verify compliance with provision 2, I reserve the right to require the ministry to provide me with a copy of the report that was disclosed to the requester.

Original signed by: October 28, 2019

Lan An
Adjudicator